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No. 03-345

# In the Supreme Court of the United States

CHRISTOPHER JAMES NYGREN
AND SHARON K. NYGREN,

*Petitioners,*

v.

MINNEAPOLIS PUBLIC SCHOOLS;
SPECIAL SCHOOL DISTRICT NO. 1; ET AL.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

## BRIEF OF AMICUS CURIAE ARC MINNESOTA AND ARC HENNEPIN-CARVER IN SUPPORT OF PETITION

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## INTEREST OF THE AMICI CURIAE[1]

Arc Minnesota is a private, non-profit corporation dedicated to ensuring full participation in their communities of persons with developmental disabilities. Arc Minnesota has 6,000 members in 27 local and regional chapters throughout the state. Arc Hennepin-Carver is the largest of those chapters. The predecessor organizations of these two organizations advocated in the 1950s for legislation requiring local school districts to educate children with disabilities. As a result, Minnesota's special education statute was enacted years before the Congress passed the Education of the Handicapped Act in 1976.

Both Arc Minnesota and Arc Hennepin-Carver have also advocated for legislation and rules governing behavioral interventions with children and adults with mental retardation and related disabilities. Both organizations advocated for legislation requiring rules governing use of aversive and deprivation procedures in the public schools, which must emphasize positive

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[1] By letter dated August 26, 2003, counsel for the respondent Minneapolis School Board consented to submission of Amicus Curiae briefs in support of CJN's Petition for Writ of Certiorari.

No part of this brief was authored by counsel for a party. No person or entity other than the Amici, their members, or counsel have made a monetary contribution to the preparation or submission of this brief.

behavioral interventions and teaching needed skills, not simply punishment of inappropriate behavior. This law ultimately passed in 1988 (1988 Minn. Laws, ch. 544) and is now codified at Minn. Stat. §§ 121A.66 and 121A.67. Both organizations were actively involved in the rule promulgation process for, and subsequent amendments to, these rules from 1988 up through 2002.

The interests of Arc Minnesota and Arc Hennepin-Carver are that the federal courts will enforce for children with disabilities and their families more demanding state law standards in accordance with the definition of "free appropriate public education" in the Individuals with Disabilities Education Act.

## SUMMARY OF ARGUMENT

The Individuals with Disabilities Education Act (IDEA) states that a free appropriate public education under that Act must be consistent with state educational standards. Minnesota laws and rules mandate the use of positive procedures to address behavior issues of students with disabilities. Those laws also give parents the unqualified right to consent, or not, to a behavior intervention plan. The Court of Appeals did not properly apply these state law standards governing behavior intervention plans. This Court should grant certiorari to ensure proper deference to state law standards in determining whether a child with a disability has been provided a free appropriate public education.

## ARGUMENT

The Congress in the IDEA and this Court in *Rowley* state that one component of the "free appropriate public education" promised by the IDEA is that it "meet the standards of the State educational agency." 20 U.S.C. § 1401(8); *Hendrick Hudson Dist. Bd. of Educ. v. Rowley,* 458 U.S. 176, 188-189, 203 (1982). Amici sought and obtained state laws and rules governing behavior intervention with students that are more demanding than the federal standard. As the court below recognized, state standards that exceed minimum federal standards are enforceable through the IDEA. *CJN v. Minneapolis Pub. Sch.,* 323 F.3d 630, 639 (8th Cir. 2003); *see also Erickson v. Albuquerque Pub. Sch.,* 199 F.3d 1116 (10th Cir. 1999); *Blackmon v. Springfield K-XII Sch. Dist.,* 198 F.3d 648 (8th Cir. 1999).

Two fundamental components of Minnesota's more demanding state educational standards were mentioned, but not enforced, by the court below. The IDEA mandates that the team devising an IEP for a child whose behavior interferes with his education or the education of others must "consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior." 20 U.S.C. § 1414(d)(3)(B)(I). In contrast, the rule adopted to comply with the legislative charge to "promote the use of positive approaches" (Minn. Stat. § 121A.67) mandates that "behavioral intervention programs focus on skills acquisition rather than merely

behavior reduction or elimination . . . ." Minn. R. 3525.0850.

This standard is meaningless unless enforced. The court below relied on "an implicit decision of sufficiency" by the administrative hearing review officer to reject the conclusion of the hearing officer that the school district failed to comply with the state standard. 323 F.3d at 639-40, 648-49. The court explained this conclusion by quoting this Court's admonition in *Rowley* that "courts must be careful to avoid imposing their view of preferable educational methods upon the States." 323 F.3d at 640 (quoting *Rowley*, 458 U.S. at 207).

But Minnesota, at the urging of Amici, adopted the educational policy which CJN's mother sought to enforce. This Court should grant review of the Eighth Circuit decision to underscore that states are free to adopt educational policies more demanding than those imposed by Congress and that federal courts must heed and enforce those state educational policies.

Minnesota's rules also give a parent the right to refuse to consent to a behavior intervention plan and to withdraw consent, if given, at any time. Minn. R. 3525.2900, Subp. 5, E. Judge Bye, in dissent in the court below, recognized that this parent had done exactly what was her right – to refuse to accept a behavior intervention program that did not comply with state standards. 323 F.3d at 649 (8th Cir. 2003).

Amici urged such a requirement when the state rule was first adopted. The fundamental importance of that right was underscored in 1994 when the Minnesota State Board of Education proposed to repeal it as part of changes in the rule to incorporate the behavior intervention plan into the IEP itself. The Administrative Law Judge reviewing this proposal pursuant to Minn. Stat. § 14.15 demurred. He stated in part:

> The Board is removing a very significant right from parents. The SONAR [Statement of Need and Reasonableness] does not explain how inclusion of the behavior intervention plan in the IEP changes the parents' interest in controlling the use of behavioral procedures. The Board has not presented a sufficient justification to eliminate this important protection. The Board's proposal to delete this protection, being unjustified, is therefore unreasonable. To cure this defect, the language expressing the parent's right to withdraw consent to behavioral interventions apart from the discipline policy of the school must be retained.

State of Minnesota, Office of Administrative Hearings, *In the Matter of Proposed Rules 3525.0200-3525.4400 Governing Special Education and 3500.1000, a Rule Governing Experimental Programs, Report of the*

*Administrative Law Judge,* at 30, ¶ 95 (69-1300-9101-1) (February 3, 1995).

CJN's mother appropriately asked the court below to enforce Minnesota's educational standards. Rather than do so, that court adopted a minimal standard for FAPE, inconsistent with the statutory requirement that the child's program must meet Minnesota's higher standards. The court's conclusion that "at the very least, . . . his behavioral problems are being sufficiently controlled for him to receive some educational benefit," 323 F.3d at 642-43, is fundamentally at odds with and fails to give appropriate deference to the standards of the state educational agency.

## CONCLUSION

This Court should grant the petition for certiorari to clarify what the Congress and this Court have stated – that a free appropriate public education must conform to the standards of the state educational agency.

Dated this 17th day of September, 2003.

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